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Nos. 73-242 and 73-255

In the Supreme Court of the United States

OCTOBER TERM, 1973

THOMAS L. THAGGARD, SR., PETITIONER

v.

UNITED STATES OF AMERICA

VANZIE BEASLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (*Thaggard* Pet. App. A) is reported at 477 F. 2d 626.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1973, and petitions for rehearing were denied on June 8, 1973 (*Thaggard* Pet. App. B). The

petition for a writ of certiorari in *Thaggard*, No. 73–242, was filed on August 4, 1973, the time for filing having been extended by Mr. Justice Powell until August 7, 1973. The petition in *Beasley*, No. 73–255, was filed on August 7, 1973, no extension of time having been obtained, and is thus untimely under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

18 U.S.C. 1955 and 1511 are set forth at *Beasley* Pet. Apps. D and E.

QUESTIONS PRESENTED

1. Whether, as claimed by both petitioners, 18 U.S.C. 1955 is an unconstitutional regulation of intrastate activities.

2. Whether, as claimed by petitioner Thaggard, 18 U.S.C. 1955 violates either the equal protection clause of the Fourteenth Amendment or the establishment clause of the First Amendment because eleemosynary organizations are exempted from the statute's coverage.

3. Whether cross-examination of petitioner Thaggard's trial counsel, who testified as a defense witness, as to the amount of his fee for representation of petitioner in this case constitutes reversible error under the circumstances as to either petitioner.

4. Whether certain of the government's rebuttal testimony, which pursued a line of inquiry initiated by the defense (*i.e.*, the decision not to prosecute certain individuals), amounted to reversible error as to petitioner Beasley.

5. Whether petitioner Beasley was deprived of a fair trial by the trial court's refusal to qualify prospective jurors by asking whether they would attach greater weight to the testimony of law enforcement officials than to that of other witnesses.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Alabama, petitioners were convicted of having conspired, in violation of 18 U.S.C. 371, to conduct a gambling business involving five or more persons, in substantially continuous operation for more than thirty days, and in violation of the laws of the State of Alabama, as proscribed by 18 U.S.C. 1955.[1] They were also convicted of having conspired to obstruct the enforcement of the criminal laws of the State of Alabama pertaining to gambling, as proscribed by 18 U.S.C. 1511. Petitioners were each sentenced to three years' imprisonment on both counts, the sentences to run concurrently. The court of appeals affirmed (*Thaggard* Pet. App. A).

Petitioners do not contest the sufficiency of the evidence, and the facts are not in dispute (*Beasley* Pet. 5).

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[1] While petitioners have not raised this issue at any stage of the proceedings, we note that the question whether it is proper to charge conspiracy to violate 18 U.S.C. 1955 is presented in *Fein* v. *United States*, No. 73-175 (petition for certiorari pending). See also *Gray* v. *United States*, No. 73-231 (petition for certiorari pending), and *Ianelli* v. *United States*, No. 73-64 (petition for certiorari pending). The government has not opposed the granting of certiorari in those cases.

In early summer of 1971, petitioner Thaggard proposed to petitioner Beasley and one James Sadie that they establish a gambling operation in a rural part of Crenshaw County, Alabama.[2] The three men became partners in the endeavor, each providing capital for the enterprise (Tr. 46–57, 58, 107–110, 414–415, 572–573, 587–588). The gambling operation commenced in late July 1971 and continued to operate through December 1971 (Tr. 59–63, 72–74, 141, 288–297, 375–378, 499, 500, 522–523, 527–529). Games of dice and blackjack were played, and customers were served steaks and drinks without charge (Tr. 63, 68, 72–73, 78–79, 288–297). Several persons were hired to operate the gaming tables, to prepare food, and to guard the patrons' automobiles. Petitioner Thaggard and several of these employees testified at trial, admitting the operation of a gambling establishment (Tr. 107–113, 120–121, 176–181, 212–214, 220–222, 453–455, 461, 467, 622–632). Several patrons of the establishment testified as well (Tr. 228–234, 240–247, 252–257, 260–262, 406–411).

When petitioner Thaggard initially approached Sadie, he advised him that there would be no interference from Crenshaw County law enforcement officials (Tr. 52–53). When the enterprise commenced operation, one employee expressed to petitioner Thaggard his concern that the gambling house might be raided. Petitioner Thaggard advised him that there was no cause for concern, because he was paying $300 a night "to keep the doors open" (Tr. 187–191). In

[2] Sadie, whose case was severed, testified for the government.

fact, local law enforcement officials did not interfere with the operation.

Agent James Day of the FBI, who was acquainted with petitioner Beasley, asked him about the gambling establishment, and Beasley admitted its operation (Tr. 375–380). After receiving this information, agent Day notified Alabama State authorities, who on November 30 conveyed that information to the local district attorney, Jessie Bryan (Tr. 378). Bryan then telephoned the County Solicitor, William King. (King and County Sheriff Ray Horn were indicted with petitioners on the Section 1511 charges; their cases were severed.) When asked whether he knew of the operation, King said he did. He also said that he had taken no money with respect to the gambling operation, but that Sheriff Horn had (Tr. 428–431).

County Solicitor King testified and denied having made this statement (Tr. 494–496). He did, however, admit knowledge that the gambling operation existed and that it operated in violation of state law. He had himself gambled at the establishment (Tr. 499–501). Telephone logs revealed sixty telephone calls between King and petitioner Beasley during the period of the conspiracy (Tr. 368) and two calls placed to King's residence from the gambling establishment (Tr. 504).

Sheriff Horn testified that he was aware through petitioner Thaggard of the operation of the illegal gambling establishment. He denied, however, the existence of any agreement not to interfere with the operation (Tr. 414–426).

The defense to the Section 1955 charge was that petitioners did not realize they were violating federal

law. In petitioner Thaggard's case, this belief was ostensibly predicated upon advice of counsel. When petitioner Thaggard initially approached Sadie in mid-1971, Thaggard told him that the proposed operation would not violate federal law (Tr. 52–53). According to Sadie, Thaggard stated that he had been advised by the United States Attorney, Ira De Ment, that the government would not prosecute (Tr. 76–77).

Petitioner Thaggard testified that he had consulted De Ment, who had represented petitioner while in private practice, because he had heard there was a new federal statute on gambling. De Ment supplied him with a copy of the statute (18 U.S.C. 1955) but, according to Thaggard, told him that he could not advise him with respect to the statute because it was new and there were no cases construing it and because it was too ambiguous. De Ment suggested that he take the statute to an attorney (Tr. 574–575, 577–579). Thaggard then consulted attorney James Straiton, his trial counsel. According to petitioner Thaggard, Straiton advised him that because only three persons would be financing and managing the operation, it would not be a violation of federal law; Thaggard testified that he relied on this advice (Tr. 580–584).

Straiton testified that he had analyzed the statute for petitioner and advised him that, although there were as yet no cases construing the statute, it was his opinion that the law was aimed at syndicated gambling. He conveyed to petitioner his opinion that, since only three partners would be involved, the operation would not violate the clear intent of the statute (Tr. 543–548). He stressed to petitioner that this advice was merely his

interpretation (Tr. 545). Straiton also testified that petitioner well knew that the operation would be in violation of state law (Tr. 552, 556).

United States Attorney De Ment testified that petitioner Thaggard had approached him for a copy of the new federal gambling statute. He provided petitioner with a copy but did not interpret it for him. Contrary to Thaggard's testimony, De Ment testified that he told him that the statute was quite clear. He did advise Thaggard to take the statute to his attorney and also indicated that he would prosecute if Thaggard violated the law (Tr. 637–639). Thaggard told De Ment that he was going to open a gambling house. De Ment told him it was a violation of state law, to which petitioner responded, "I can handle the locals" (Tr. 644). Two weeks after having received a copy of the statute, petitioner Thaggard again contacted De Ment, stating that he had read the statute and saw no "way to get around it", and De Ment told him that his impression was quite correct (Tr. 645).

When agent Day spoke with petitioner Beasley, he advised him that the gambling operation might violate federal law. While Beasley indicated that he wished to avoid violating federal law, he never stated that he did not realize that he was violating federal law (Tr. 379–381, 387–390). An employee of the establishment testified that when he asked the partners whether the gambling operation violated federal law, they replied that as far as they knew there was no violation (Tr. 455). Sadie, in particular, said that there was nothing to worry about because if they were in violation of federal law, they did not know it (Tr. 466).

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ARGUMENT

1. Both petitioners contend that because, in a prosecution under 18 U.S.C. 1955, the government need not demonstrate that a particular gambling enterprise has any impact upon interstate commerce, that statute unconstitutionally regulates intrastate activities. Relying upon the legislative determination that illegal gambling is an enterprise which involves the widespread use of interstate facilities and significantly affects interstate commerce, the courts of appeals have consistently rejected such claims, *United States* v. *Hunter,* 478 F. 2d 1019, 1020–1021 (C.A. 7); *United States* v. *Palmer,* 465 F. 2d 697 (C.A. 6), certiorari denied, 409 U.S. 874; *United States* v. *Becker,* 461 F. 2d 230, 233–234 (C.A. 2); *United States* v. *Riehl,* 460 F. 2d 454, 458 (C.A. 3); *Schneider* v. *United States,* 459 F. 2d 540 (C.A. 8), and there is no reason for this Court to review the decision of the court of appeals in this regard.

2. Petitioner Thaggard also contends that because eleemosynary organizations—*i.e.,* those exempt from tax under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended—are exempt from the coverage of the statute, Section 1955 violates the equal protection clause of the Fourteenth Amendment.[3] The exemption reflects, however, a rational and valid

[3] Although the petition relies upon the Fourteenth Amendment, which is inapplicable to acts of Congress, we treat the petition as contending that Section 1955 violates the similar requirements of the due process clause of the Fifth Amendment. See *United States Department of Agriculture* v. *Moreno,* No. 72–534 (decided June 25, 1973).

distinction. See *Tigner* v. *Texas*, 310 U.S. 141. The legislative history indicates that Section 1955, part of the Organized Crime Control Act of 1970, 84 Stat. 937, is primarily aimed at gambling enterprises, the profits of which, Congress concluded, constitute a major source of power for organized crime. See *United States* v. *Harris*, 460 F. 2d 1041, 1044–1048 (C.A. 5). Exemption of essentially non-profit organizations from the coverage of Section 1955 is logically consistent with that purpose. Nor does the exemption, to the extent it includes religious organizations, contravene the establishment clause of the First Amednment, as petitioner urges. See *Walz* v. *Tax Commission*, 397 U.S. 664.

3. Petitioners also contend that the trial court committed reversible error in permitting the prosecutor to inquire, in cross-examining Straiton (petitioner Thaggard's counsel, who testified as a defense witness) as to the amount of the fee received by Straiton for his representation of petitioner Thaggard in this case. The court accepted the prosecutor's position that such questioning was relevant to show the witness's bias and credibility (Tr. 550–551). Petitioners urge that this line of questioning was particularly prejudicial, since profitability was in effect an element of the offense. The court of appeals concluded, without considering the profitability argument, that inquiry as to "the amount of fee paid to counsel for services in the case *then on trial before the jury*" was improper (*Thaggard* Pet. App. A12; emphasis in original). The court concluded, however, that the evidence with respect to operation of the

gambling house, virtually unrefuted even at trial and supplied in large part by petitioner Thaggard and other principals, was so overwhelming that the error was harmless beyond a reasonable doubt and that "an acquittal would have been an incredible event" even had petitioners received an errorless trial (*id.* at A12–A13). That conclusion was supported by the record in this case and does not warrant review by this Court.

4. During cross-examination of government witnesses Horn and King, the defense fully explored the witnesses' motives for testifying. Responses to questioning aimed at determining why these men had not been prosecuted disclosed that both believed the cases against them, which had been severed, would be dropped in return for their testimony. At one point in the questioning, defense counsel strongly implied that the charges against King were to be dismissed because the prosecutor knew King had not received anything to obstruct enforcement of the gambling laws. (Tr. 583–584, 671–672.)

When De Ment testified in rebuttal, the decision to prosecute certain individuals and to forego prosecution of others was explored more fully. He testified that as United States Attorney he considered it more important that these public officials resign their offices than that they be prosecuted, and he agreed to drop the charges against them in return for their resignations and their cooperation as witnesses (Tr. 642, 649, 658–663).

This line of questioning, in an area first explored by defense counsel and designed both to expose the

situation fully to the jury and to counter defense counsel's implication that the decision not to prosecute these individuals was due to an insufficiency of evidence, was not in our view improper under the circumstances. The court of appeals thought otherwise, concluding that neither side should have entered this area, at least to the extent that it involved the exercise of prosecutorial discretion. The court concluded, however, that the testimony, while improperly admitted, did not warrant reversal (*Thaggard* Pet. App. A7–A9). Accepting the premise of the court of appeals, this conclusion was correct.

5. Finally, petitioner Beasley asserts that the trial court erred in refusing to qualify prospective jurors by inquiring whether they would attach greater weight to the testimony of law enforcement officials than to that of ordinary witnesses. The contention is without merit. The failure to give such an instruction constitutes no abuse of discretion where, as here (Tr. 150–151, 157, 900–903), the jury is otherwise properly instructed on the standards for weighing and evaluating testimony. See, *e.g.*, *United States* v. *Jackson*, 448 F. 2d 539, 541–543 (C.A. 5);[4] *Ross* v. *United States*, 374 F. 2d. 97, 105 (C.A. 8), certiorari denied, 389 U.S. 822;

[4] Petitioner's reliance upon *Brown* v. *United States*, 338 F. 2d 543 (C.A.D.C.), and *Sellers* v. *United States*, 271 F. 2d 475 (C.A.D.C.), is misplaced. In those cases, refusal to give the tendered instruction was held to be reversible error where the testimony of law enforcement officials was virtually the entire case for the prosecution. In this case, the government relied heavily upon the testimony of the principals and that of employees and customers of the gambling establishment.

Gorin v. *United States*, 313 F. 2d 641, 646–647 (C.A. 1), certiorari denied, 374 U.S. 829.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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